

## YetterColeman LLP

September 27, 2014

Arturo A. Rivera  
Case Manager to the Hon. Gregg Costa  
601 Rosenberg Street  
Galveston, Texas 77550


Re: *Bear Ranch, LLC v. HeartBrand Beef Inc., et al.*, No. 6:12-cv-00014; in the  
United States District Court for the Southern District of Texas

Dear Mr. Rivera:

Please allow this letter to serve as a notice of additional authority regarding whether the cap on exemplary damages in Tex. Civ. Prac. & Rem. Code §41.008 is an affirmative defense. In its recent rejoinder, HeartBrand argues that the amendment of the cap in 1995, defining certain actions in which the cap does not apply, transformed it into an affirmative defense, even though a defendant still has nothing to prove and the statute still provides clear notice of its restriction. In response, we call the Court's attention to *THI of Tex. at Lubbock I, LLC v. Perea*, 329 S.W.3d 548, 588 (Tex. App.—Amarillo 2010, pet. denied), which rejects a waiver argument that the cap, *as amended*, is an affirmative defense. The “cap provided by § 41.008(b) is not an affirmative defense, but must instead be applied as a matter of law.” *Id.*

Cordially yours,

YETTER COLEMAN LLP

By:   
R. Paul Yetter

Counsel for Bear Ranch, LLC

cc: James A. Reeder, Jr., Esq.